

**Matter of:** Vito J. Gautieri  
**File:** B-261707  
**Date:** September 12, 1995

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Robert J. MacPherson, Esq., Postner & Rubin, for the protester.  
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#### **DIGEST**

Rejection of protester's offer of building in flood plain was proper where solicitation stated (as provided in applicable administrative order, implementing Executive Order No. 11988), that flood plain property would be leased only if it was the only practicable alternative, and agency reasonably determined that awardee's non-flood plain property was a practicable alternative to leasing protester's flood plain property.

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#### **DECISION**

Vito J. Gautieri protests the award of a contract to Batavia Big N Plaza Associates under solicitation for offers (SFO) No. MNY-94393, issued by the General Services Administration (GSA) to lease office space in Batavia, New York. Gautieri asserts that the award to Batavia at a rent higher than that proposed by Gautieri, on the basis that Gautieri's offered building is in a flood plain, was improper.

We deny the protest in part and dismiss it in part.

The SFO provided that offers would be evaluated under several factors, price being less important than the other three factors combined. The solicitation also provided that the contract would not be awarded for a property located in a flood plain unless that was the only practicable alternative. In this regard, Executive Order No. 11988, 42 Fed. Reg. 26,951 (1977) (implemented by GSA Administrative Order ADM 1095.2, July 23, 1979), precludes federal agencies from providing direct or indirect support of flood plain development when there is a practicable

alternative. The purpose of the order is to minimize the impact of floods on human safety and health and the wetlands. A practicable alternative to acquiring leased space in a flood plain is defined under paragraph 10 of ADM 1095.2 as one which:

- (a) meets justified program requirements;
- (b) is within the legal authority of GSA or client agency;
- (c) meets technological standards;
- (d) is demonstrated as being cost effective; and
- (e) does not result in unreasonable adverse environmental impacts.

Seven offers, including the protester's, were received. GSA determined that five of the offered properties were acceptable and were not located in a flood plain. Since Gautieri's property was in a flood plain, GSA rejected it, and subsequently awarded the lease to Batavia for an annual rent of \$91,733, compared to Gautieri's offered price (for the space GSA was currently leasing) of \$50,467.50.

Gautieri protests that, because the rent on Batavia's property is higher than Gautieri's, leasing Batavia's property is not cost effective, and thus is not a practicable alternative to leasing Gautieri's property within the meaning of ADM 1095.2. Gautieri concludes that, under these circumstances, GSA was required to lease Gautieri's lower-priced flood plain property.

The protest is without merit. While Gautieri's offered flood plain property was less expensive than Batavia's, there is nothing in the orders which dictates that this consideration be determinative of cost effectiveness; indeed, neither order defines the term "cost effective" at all. Thus, the determination of cost effectiveness has been left largely to GSA's discretion, although ADM 1095.2 does provide some guidance--it specifically warns against defeating the purpose of the orders by restrictively applying the elements of the practicable alternative definition (such as cost effectiveness) to avoid leasing non-flood plain property.

GSA was well aware of Gautieri's lower-offered price, but considered two measures of the value of Batavia's property as nevertheless showing that Batavia's property was a cost effective non-flood plain alternative--Batavia's was the lowest-cost, highest technically rated non-flood plain property, and an independent appraisal concluded that Batavia's offered price was below the fair market value for the lease. Both of these considerations clearly bear on the relative value of the offered property and, thus, the cost effectiveness of the non-flood plain alternative. There

thus simply is no basis for questioning the reasonableness of GSA's determination to make award to Batavia.

Gautieri also protests that by awarding the lease without considering alternative sites, such as Gautieri's, which would result in substantial savings to the government, the agency essentially disregarded the requirement that price be considered in the award decision. As noted above, however, GSA did take price into consideration; Batavia's was the lowest priced among the five acceptable offers. There is no requirement that award be made to the low-priced offeror in a negotiated procurement. Ameriko Maintenance Co., B-250786, Feb. 16, 1993, 93-1 CPD ¶ 145.

Gautieri argues that its building is only marginally in a flood plain and that its proposal therefore should not have been rejected. Under our Bid Protest Regulations, protests based on other than solicitation improprieties must be filed within 10 working days after the protester knows or should know the basis of protest. 4 C.F.R. § 21.2(a)(2) (1995). GSA informed Gautieri in February 1995, 2 months after offers were submitted, that Gautieri would not be considered for award because it offered space in a flood plain. Any challenge to this determination had to be filed no later than 10 working days thereafter. Since Gautieri did not raise this issue until it filed its protest on June 14, it is untimely and will not be considered.

Gautieri maintains that GSA should have entered into a succeeding lease with Gautieri, instead of awarding a new lease, because this would have been a more cost effective means of meeting the requirement. This argument ignores the fact that Gautieri's property was in a flood plain, contrary to executive policy, as discussed above. In any case, the argument is untimely. Since it was clear when the SFO was issued that GSA intended to award a new lease, not extend Gautieri's, any protest on this ground had to be filed no later than the closing date; Gautieri did not protest until after award. 4 C.F.R. § 21.2(a)(1).

The protest is denied in part and dismissed in part.

\s\ Ronald Berger  
for Robert P. Murphy  
General Counsel